SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1939

No. 327

KENTON TOBACCO BOARD OF TRADE, INCORPORATED, ET AL.,

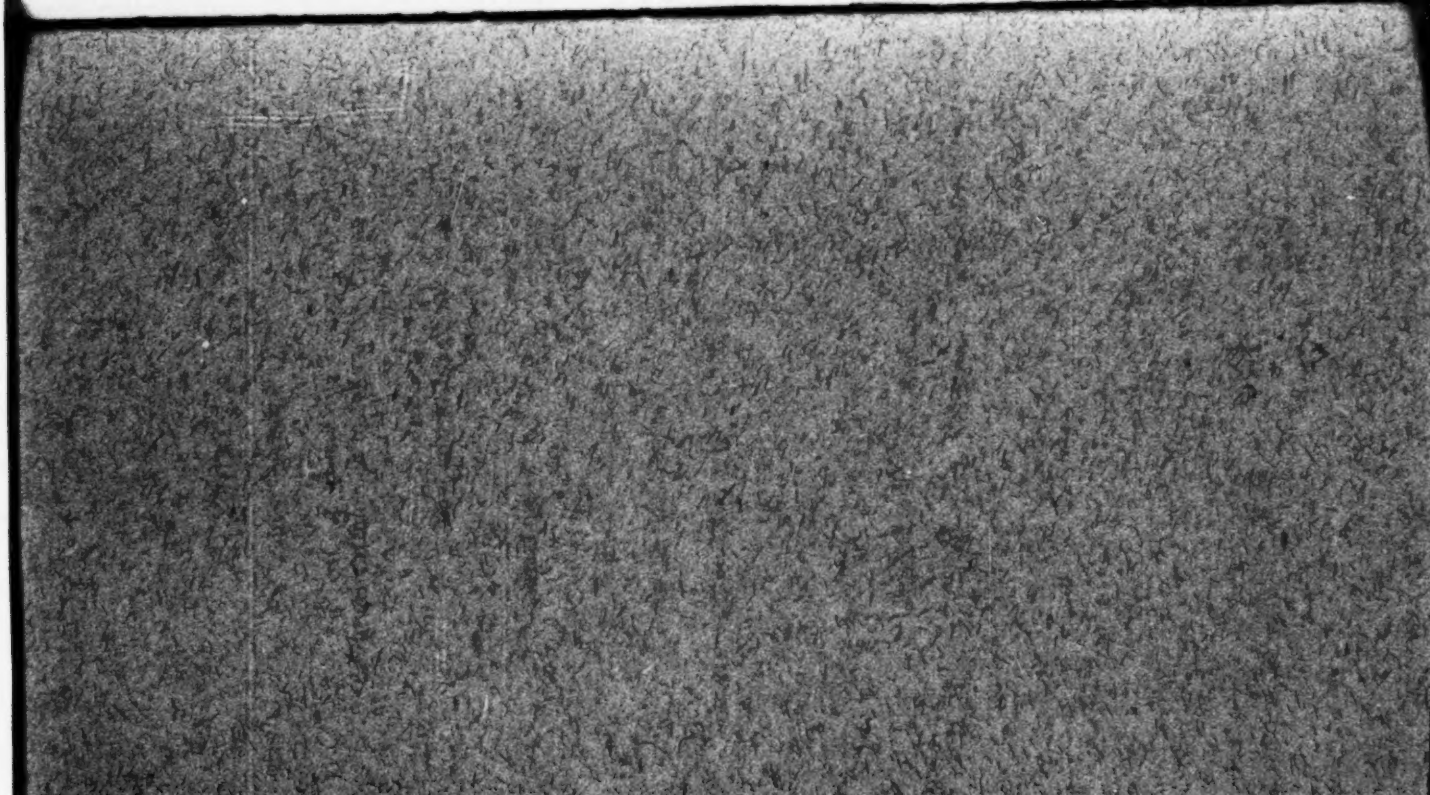
Petitioners,

vs.

LIGGETT AND MYERS TOBACCO COMPANY, A CORPORATION, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NORTH CAROLINA.

James A. Jones,
Counsel for Petitioners.



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vs.

LIGGETT AND MYERS TOBACCO COMPANY, A CORPORATION, ET AL.

Respondents

PETITION FOR WRIT OF CERTIORARI

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioners, Kinston Tobacco Board of Trade, Incorporate, et al., pray that a writ of certiorari issue to the Supreme Court of North Carolina, to review the judgment of that Court in this case filed June 11, 1952.

A certified transcript of the record in this case, including the proceedings in the Supreme Court of the State of North Carolina, is furnished herewith in compliance with Rule 38 of the Rules of this Court.

Summary Statement of the Matter Involved

The petitioners is a corporation, duly chartered and existing under and by virtue of the laws of the State of North

Carolina (Appellants' App. 1, p. 3), and is charged with the duty and responsibility of operating the Kinston Tobacco Market for the auction sale of leaf tobacco (Appellants' App. 1, p. 4). It is charged with the duties and responsibilities under the General Statutes of the State of North Carolina, Chap. 106, sub-section 465, and under its Constitution and By-Laws, with the duty of economically and efficiently handling the sale of leaf tobacco at auction on the said market so as to promote the honest and efficient conduct of said business, to build up the said tobacco market, to protect the interest of the growers, sellers, buyers and handlers of leaf tobacco on the said market (Appellants' App. 1, p. 5).

Fourteen warehouses are operated under the direction and supervision of the petitioner for the auction sale of leaf tobacco upon the Kinston market; and the respondents, together with all other purchasers of tobacco, and the operators of the said warehouses, are members of the petitioner, Board of Trade (Appellants' App. 1, p. 2).

Petitioner, Board of Trade, is authorized by its Constitution and By-Laws, and by the statute, to establish sales on the said Kinston Tobacco Market, including the drafting of a sales card on which is listed the schedule and order of sales for the auction sale of leaf tobacco upon the said market (Appellants' App. 1, p. 6).

Respondents are, and have been for a long number of years, engaged in the purchase of leaf tobacco upon the Kinston auction sale market, including the years 1949, 1950 and 1951 (Appellants' App. 1, pp. 6-7). Respondents, and other members of petitioner, Board of Trade, are required, by the terms and provisions of its Constitution and By-Laws, to abide by its rules and regulations (appellants' App. 1, p. 6), which, when adopted, have the force and effect of a written contract between said Board of Trade and its members (Appellants' App. 1, p. 296).

The petitioner, Board of Trade, duly established a five-sale market for the sale of leaf tobacco on the Kinston tobacco auction sale market, under its Constitution and By-Laws, for the 1949 sales season, and which has continued through the 1950 and 1951 sale season (Appellants' App. 1, p. 8). The addition of the fifth sale in the operation of the said market was in recognition of a service the petitioner and its members, including the respondents, owed to the producers of leaf tobacco in the Kinston trade territory (Appellants' App. 1, p. 8) the added buying service having been made necessary on account of the expansion in the growth and production of leaf tobacco in the Kinston trade territory, in which more than 17,000 producers reside, cultivating more than 68,000 acres of tobacco, producing more than 100 million pounds annually (Appellants' App. 1, p. 13), and to avoid the necessity for the transportation by the said farmers to markets located a greater distance from their respective farms than the Kinston market; the loss of tobacco occasioned by its being damaged between the time it was prepared for market and the time when the farmers could offer the same for sale, with the limited buying facilities in the operation of the said market as a four-sale market (Appellants' App. 1, p. 14-15), and to enable the petitioner, Board of Trade, to operate the said market without discrimination and in such a manner as to preserve to each individual uniform and impartial treatment in the marketing and sale of their tobacco.

The petitioners further charge that the combined purchases by the respondents upon the auction sale market of leaf tobacco in Kinston, and the other markets in the belt of which Kinston is a part, exceeds 50% of the total tobacco sold on said markets, and that they have purchased in those quantities upon the said markets for a long number of years, to the knowledge of the farmers, producing tobacco in said Kinston trade territory (Appellants' App. 1, p. 7).

Petitioners further charge respondents with discriminating against the fifth sale established by it in the operation of the Kinston tobacco market for the auction sale of leaf tobacco, by failing to place a buyer, or other agency authorized to purchase leaf tobacco upon said sale, with authority to buy upon their account (Appellants' App. 1, p. 15), which conduct was detrimental to the best interest of the farmers and/or producers of tobacco, the warehousemen and others engaged in the sale of tobacco on the said market, and subjected the farmers and warehousemen to substantial loss in depreciation in the value of their tobacco while it awaited sale, and in the added cost in transporting the same to more distant markets (Appellants' App. 1, p. 16).

Petitioners further charge that the discrimination by the respondents against the fifth sale in the operation by petitioner, Board of Trade, of the said market, prompted competing auction sale markets to emphasize, through all mediums employed in soliciting tobacco for sale upon such markets, that all sales on the Kinston market were not participated in by all buying companies, which practice was materially detrimental to the successful operation of the Kinston tobacco market (Appellants App. 1, pp. 16-17).

Petitioners further charge that the sale of tobacco at auction, through the warehouses conducted by the petitioner, Board of Trade, for the auction sale of leaf tobacco, is a business affected with the public interest, and those carrying on the said business, including the petitioners and the defendants, are obliged to carry on said business in such a way as to be reasonable and beneficial to the tobacco trade, and so as not to discriminate against either the buyers, the sellers or others who patronize the said market, or participate in the purchase and sale of leaf tobacco thereon (Appellants' App. 1, pp. 7-8).

Petitioners further charge that the defendants, acting together, and after the establishment of the said five-sale

market, and by continuous parallel action, have participated on four of the five sales, and failed and refused to participate on the fifth sale, said conduct being with the knowledge of each other, and unlawful discrimination against the tobacco farmers and producers who offer their tobacco for sale on said market, and render impossible the performance of the obligation of the petitioner, Board of Trade, in its operation of a business affected with a public interest, to so conduct the Kinston tobacco market as to avoid discrimination in prices, in competitive bidding, in advertisements by competing markets, in stifling and suppressing competition, in usurping the floor space used by the warehouse operators for the resale of their tobacco which would otherwise be available to the farmers for the orderly and advantageous marketing of their tobacco; and further charged that the said discrimination on the part of the said respondents is detrimental to the public interest, and particularly the Kinston tobacco market, the growers, sellers and handlers of leaf tobacco thereon.

Petitioners further charge that the respondents will continue the discrimination practiced unless they are restrained from doing so by mandatory and prohibitory injunction (Appellants' App. 1, p. 9).

Petitioners further charge that they are entitled to mandatory and prohibitory injunctive orders requiring the respondents to participate on all five of the sales conducted by the petitioners, Board of Trade, in the operation of the auction sale market for the sale of leaf tobacco, by placing buyers upon each of said sales with instructions and authority to purchase on each, in a reasonably uniform manner, as to quantity and competitive bidding, and so as not to indicate any discrimination in bidding or purchase of tobacco on any one of the several sales as compared to the others (Appellants' App. 1, p. 11).

The suit was instituted by petitioners in the Superior Court of Lenoir County, North Carolina, on September 28, 1951 (Appellants' App. 1, p. 2). On September 28, 1951, Honorable Henry L. Stevens, Jr., Resident Judge of the Superior Court for the Sixth Judicial District of North Carolina, entered a temporary prohibitory injunction, requiring each of the respondents to forthwith place a buyer or other purchasing agent or agency on each of the five sales being conducted by the petitioner, Board of Trade, in the operation of the Kinston tobacco auction market, with instructions and authority to engage in competitive bidding on each grade or type of tobacco reasonably comparable to the participation bidding and purchase of leaf tobacco on the four sales on which the said respondents were then participating in the operation of the said market, and so as not to indicate any discrimination against either of the five sales conducted by the petitioner, Board of Trade, in the operation of the said market (Appellants' App. 1, pp. 19-22-23), and restraining the respondents from discriminating against any one of the five sales then being conducted by petitioner, Board of Trade, in the operation of the said market, by failing and refusing to participate on the fifth sale, through the medium of a buyer or some other agent or agency authorized and instructed to bid upon the leaf tobacco sold thereon, and purchase leaf tobacco thereon in substantially the same manner and to substantially the same extent as said respondents were participating in the purchase of tobacco on the other four sales being conducted in the operation of the said market (Appellants' App. 1, p. 23).

Evidence was offered upon the hearing upon the return to the temporary order, substantially supporting petitioner's allegations (Appellants' App. 1, pp. 226-346).

The respondents each demurred ore tenus and filed written demurrers challenging the right of the petitioners to

enforce the reasonable rules and regulations of petitioner, Board of Trade, and to require the respondents to discontinue their discrimination against the Kinston tobacco market in the manner set out in the complaint, upon the ground that such relief was in violation of the 5th and 14th amendments to the Constitution of the United States (Appellants' App. 1, p. 53; Appellants' App. 1, pp. 60-61; Appellants' App. 1, pp. 81-82; Appellants' App. 1, pp. 99-121-123).

The Court, in the course of the hearing, entered an order making a number of farmers parties to the said action (Appellants' App. 1, p. 146), and allowing the petitioners to amend their complaint (Appellants' App. 1, p. 149).

At the conclusion of the hearing, the Court entered an order finding the facts in accordance with the evidence offered, and continuing the mandatory and prohibitory injunction to the final hearing (Appellants' App. 1, pp. 152-178).

The respondents appealed to the Supreme Court of North Carolina and, on June 11, 1952, said Court filed an opinion and judgment reversing the order of Judge Stevens entered in the said case, and directing that the said action be dismissed (R. 347).

Jurisdiction

The jurisdiction of this Court is invoked under United States Code, Title 28, Sec. 1257, "State Courts, Appeal; Certiorari".

The judgment of the Supreme Court of North Carolina, which petitioners seek to have reviewed, was entered on June 11, 1952 (R. 352).

The Questions Presented

(1) Is petitioner, Kinston Tobacco Board of Trade, Incorporated, vested with the power to enforce its reasonable

rules and regulations adopted for the government and conduct of the Kinston Tobacco Market for the auction sale of leaf tobacco, a business affected with a public interest?

(2) Is the rule adopted by the petitioner, Kinston Tobacco Board of Trade, Incorporated, for the operation of the Kinston Tobacco Market, as a five-sale market for the auction sale of leaf tobacco under the facts alleged in the complaint, and established by the evidence offered by plaintiffs, a reasonable rule and regulation?

(3) Is the enforcement of the reasonable rules and regulations adopted for the government and conduct of the Kinston tobacco market for the auction sale of leaf tobacco, a business affected with a public interest, an invasion of any rights or privileges guaranteed to the respondents, or either of them, by the 5th and 14th amendments to the Constitution of the United States, or so as to affect interstate commerce in violation of Sec. 8 of Article I, of the Constitution of the United States, vesting in the Congress of the United States the power to regulate commerce with foreign nations and among the several states and with the Indian Tribes, or an unconstitutional invasion of the rights of the respondents, or either of them, in the regulation and conduct of their respective businesses, or the denial of any other right guaranteed to them, or either of them, under the constitution and laws of the United States of America, or the State of North Carolina, or the taking of property of the respondents, or either of them, without due process of law, or deny to either of the defendants the equal protection of the law, in violation of the 5th and 14th amendments to the Constitution of the United States of America?

Reasons for Granting the Writ

The petitioners instituted the case at bar for the purpose of enforcing the reasonable rules and regulations of the petitioner, Board of Trade, in the operation of the Kinston

tobacco market for the auction sale of leaf tobacco, a business affected with a public interest, and to enjoin the respondents by mandatory and prohibitory orders of the Court, firm discriminating against any one of the five sales operated by petitioner, Board of Trade, in the operation of the said tobacco market.

The petitioners invoked, and now invoke, in support of their right for the redress of the wrongs set forth in the complaint and amended complaint filed in this case, the principles of common law relating to the conduct of a business affected with a public interest, well recognized by the Supreme Court of the United States in a number of decisions, including *Munn* v. *Illinois*, 94 U. S., 113; *Camfield* v. *U. S.*, 167 U. S. 518; and the General Statutes of North Carolina, Chapter 106, Section 465, as follows:

> "Tobacco warehousemen and purchasers of leaf tobacco, at auction, on warehouse floors, are hereby authorized to organize, either as non-stock corporations, or voluntary associations, tobacco boards of trade in the several towns and cities in North Carolina in which leaf tobacco is sold on warehouse floors, at auction.
>
> "Such tobacco boards of trade as may now exist, or which may hereafter be organized, are authorized to make reasonable rules and regulations for the economical and efficient handling of the sale of leaf tobacco at auction on the warehouse floors in the several towns and cities in North Carolina in which an auction market is situated."

The petitioners also rely on the principles of law which have been adhered to by the United States Supreme Court and the courts of many other jurisdictions in the United States, declaring that boards of trade are vested with authority to enforce their reasonable rules and regulations in the operation of a business affected with a public interest, and sustaining the position that those engaged in

a business affected with a public interest to the extent of the public interest, yield their sovereign right to have their business controlled in the public interest.

Board of Trade v. *Olsen*, 262 U. S., 1;
Noble State Bank v. *Haskell*, 219 U. S., 104.

The respondents challenge the right of the petitioners to invoke the principles of law announced in the foregoing and many other decisions of the Supreme Court of the United States, and the courts of other jurisdictions, in their efforts to prevent the respondents from continuing the discriminatory practices set forth in the complaint filed in this case, and thus bring to an end the injury and damage to the tobacco producers, the operation of whose business affects the economic welfare of more than 200 thousand people, upon the ground that to sustain said petitioners' alleged cause of action would be in violation of the rights guaranteed to them (the respondents) under the 5th and 14th amendments to the Constitution of the United States, a taking of their property without due process of law, an invasion of the rights guaranteed to them under the provisions of the Constitution of the United States and of the State of North Carolina, to contract and be contracted with, and to conduct their business in the exercise of the rights guaranteed to them by the said Constitutions as free enterprises; and would also be an invasion of the right of the Congress of the United States to control inter-state commerce between the several states and foreign nations, etc.

The Supreme Court of North Carolina held that the petitioner Board of Trade, had no right to enforce its rule and regulation establishing a five-sale market in the operation of the Kinston tobacco market in the public interest, and to require the respondents to participate upon each of the five sales conducted in the operation of the

said market in an impartial and indiscriminate manner, and so as to provide substantially equal sales facilities on each of the five sales, and to discontinue the discriminatory practices indulged in by them, which was resulting in irreparable injury and damage to the tobacco growers in the said marketing territory, and to challenge the very existence of the market upon the ground that such a holding would be revolutionary in principle and strike at the heart of our system of free enterprise, and invade private rights. It further held that such rules and regulations could only be enforced by the petitioner, Board of Trade, upon agreement of the respondents, express or implied.

The petitioners, as ascertained from an examination of the opinion and judgment of the Supreme Court of North Carolina, have exhausted the remedies available to them under the constitution and laws of the State of North Carolina, as construed by the Supreme Court of North Carolina; and, unless this Court accepts jurisdiction of this case, and reviews the opinion and judgment of the said Supreme Court of North Carolina, the said petitioners will have been denied rights, privileges and properties, safeguarded to them under the Constitution of the United States of America.

WHEREFORE, your petitioners respectfully pray that a writ of certiorari be issued to the Supreme Court of North Carolina, to the end that this cause may be reviewed and determined by this Court; that the judgment of the Supreme Court of North Carolina be reversed, and that the petitioners be granted such other and further relief as may be proper.

JESSE A. JONES,
Counsel for Petitioners.

Kinston, North Carolina
September 8, 1952.

STATE OF NORTH CAROLINA,
COUNTY OF LENOIR:

R. E. SHEPPARD, being first duly sworn, deposes and says:

That he is an officer of the petitioner, Kinston Tobacco Board of Trade, Incorporated, to-wit: President, and as such that he is authorized to make this affidavit; that he has read the foregoing and annexed Petition for Writ of Certiorari; that the facts set forth therein are true of his own knowledge, except as to those matters and things therein stated upon information and belief, and as to those, he believes it to be true.

R. E. SHEPPARD.

Sworn to and subscribed before me, this September 8, 1952.

MOLLIE V. HART,
Notary Public

My commission expires July 4, 1953.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1952

KINSTON TOBACCO BOARD OF TRADE, INCORPORATED, *et al.*, *Petitioners* v. LIGGETT & MYERS TOBACCO COMPANY, A CORPORATION, *et al.*, *Respondents*	No. 327

BRIEF FOR LIGGETT & MYERS TOBACCO COMPANY IN OPPOSITION

OPINION BELOW

The opinion of the Supreme Court of the State of North Carolina dated June 11, 1952 (R. 347) is reported in advance sheets of the official reports, 235 N. C. 737, and in 71 SE 2d 21.

JURISDICTION

Petitioner invokes the jurisdiction of this Court pursuant to Section 1257 of Title 28, U. S. C. (June 25, 1948, c. 646, 62 Stat. 929).

The questions here do not concern the validity of any statute. Petitioner must therefore rely upon that portion of Section 1257(3) which provides for review by this Court:

> ". . . where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of . . . the United States."

The Petition must be denied for want of jurisdiction of this Court because there is an adequate non-federal ground for the decision below.

QUESTIONS PRESENTED

The following issues of local law were decided below:

(a) Whether Petitioner was entitled to a preliminary mandatory injunction changing the status quo.

(b) Whether Petitioner was "authorized by law to establish a fifth sale on the Kinston market and require that each of the defendants assign buyers, with instructions to bid and purchase, on the fifth sale substantially the same quantity of tobacco at substantially the same price as each had theretofore purchased upon each of the four sales theretofore conducted upon said market." (Opin. below, R. 349-50)

STATUTE INVOLVED

Petitioner was organized under an Act governing Tobacco Boards of Trade (Gen. Stat. N. C., Sec. 106-465, as amended P. L. 1951, c. 383) which, insofar as it is material, provides:

> "Such tobacco boards of trade as may now exist, or which may hereafter be organized, are authorized to make reasonable rules and regulations for the economical and efficient handling of leaf tobacco at auction on the warehouse floors in the several towns and cities in North Carolina in which an auction market is situated.
>
> • • • • •
>
> "Membership, in good standing, in local boards of trade shall be deemed a reasonable requirement by such boards of trade as a condition to participating in the business of operating a tobacco warehouse or the purchase of tobacco at auction thereon.

"Nothing in this section shall authorize the organization of any association having for its purpose the control of prices or the making of rules and regulations in restraint of trade."

STATEMENT

For many years Kinston Tobacco Board of Trade, the Petitioner here, conducted four auction sales. It established a fifth sale in 1949. Liggett & Myers Tobacco Company (referred to as Liggett) and other Respondents herein purchased tobacco at four sales but did not attend the fifth.

On September 28, 1951 Petitioner instituted suit in the Superior Court of North Carolina, Lenoir County, to compel attendance by Liggett and other Respondents at the fifth sale pursuant to a resolution it had adopted on September 24, 1952 without notice to Liggett, that Respondents:

> ". . . participate on all five of the sales . . . with uniformity as to bidding, and purchase of tobacco on each of the said sales and/or on such additional sale or sales as may hereafter be duly established." (R. 13, 18)

On the basis of the complaint, treated as an affidavit, Petitioner obtained a temporary mandatory injunction from a District Judge requiring each Respondent to place a buyer on each of the five Kinston sales:

> ". . . with instructions and authority to engage in the competitive bidding on each grade or type of tobacco reasonably comparable to the participation, bidding and purchase of leaf tobacco on the four sales on which the said defendants are now participating . . . ." (R. 19, 22-23)

Liggett demurred to the complaint (R. 51). The demurrer was overruled, and the Court issued an order

continuing the mandatory injunction in force pending final hearing on the merits (R. 152, 178). Liggett took exceptions to the order by appropriate appeal entries (R. 179) and the appeal was heard by the Supreme Court of North Carolina, which rendered its decision reversing the lower court and holding that "the mandatory injunction was improvidently entered and that the demurrers ore tenus should have been sustained." (R. 351)

ARGUMENT

The unanimous decision below rests upon adequate and independent non-federal grounds—a circumstance precluding jurisdiction in this Court. *DeSaussure* v. *Gaillard*, 127 U. S. 216 (1888); *Lynch* v. *N. Y.*, 293 U. S. 52 (1934); *Fox Film Corp.* v. *Muller*, 296 U. S. 207 (1935); *Herb* v. *Pitcairn*, 324 U. S. 117, 125-6 (1945).

The Supreme Court of North Carolina decided:

(1) That the Superior Court had no power to change the status quo by preliminary mandatory injunction—purely a matter of local procedure, and

(2) That the Board of Trade had no power to promulgate the resolution in question—purely a matter of corporate powers under state law.

Directing itself to the latter question, the Court held (R. 351):

". . . The corporate plaintiff has no authority to legislate. It can not create a duty where the law creates none. The Legislature has the authority to regulate, within constitutional limits, the sale of leaf tobacco upon the auction markets of this State, and in doing so may prescribe standards of conduct to be observed by those who conduct auction warehouses as well as others participating in the sales. But this is a non-delegable power. Motsinger *v.* Perryman, 218 NC

> 15, 9 SE 2d 511, and cases cited; S. *v.* Harris, 216 NC 746, 6 SE 2d 854. The power to regulate may be delegated to an administrative agency only to the extent of 'filling in the details' within the general scope and expressed purpose of the statute prescribing the standards. Motsinger *v.* Perryman, supra."

Only North Carolina cases were cited in support of the decision.

Petitioner did not set up or claim a right, privilege or immunity under the Constitution or statutes of the United States.

The Supreme Court of North Carolina did not base its holding, directly or indirectly, upon Constitutional grounds asserted by Liggett or by other Respondents. Its opinion neither considered nor decided the questions which Petitioner deems presented in Item 3 (Pet. p. 8); none of them was essential to its decision.

CONCLUSION

For the foregoing reasons the Petition for a Writ of Certiorari should be denied.

Dated: October, 1952.

Respectfully submitted,

BETHUEL M. WEBSTER,
Counsel for Respondent
Liggett & Myers Tobacco Company

FRANCIS H. HORAN,
F. L. FULLER, JR.,
FREDERICK P. HAAS,
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